U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Nov2001

CASE NO.: 2000-STA-47

In the Matter of:

LARRY E. EASH,
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

On June 13, 2001, the undersigned issued an Initial Recommended Decision and Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. In that Decision and Order the undersigned dismissed several of complainant's allegations, but determined that a genuine issue of material fact existed as to some of the allegations. On June 22, 2001, the undersigned issued an Order Denying Respondent's Motion for Reconsideration.

A hearing was conducted in Akron, Ohio on June 25, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations issued thereunder. During the hearing Respondent's Exhibits Nos. 1 through 39 and Complainant's Exhibits Nos. 1 through 19 were received in evidence.[1] The parties' Proposed Findings of Fact and Conclusions of Law and responses were submitted post-hearing. All of this evidence has been made part of the record.

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[1] The following abbreviations have been used in this opinion: RX = Director's exhibits; EX = Employer's exhibits; TR = Hearing Transcript.

BACKGROUND

On or about March 26, 1988, Larry E. Eash, Sr. ("complainant") was hired by Roadway Express, Inc. ("respondent") as a commercial motor vehicle driver. (RX 1). Complainant filed a timely complaint with the Secretary of the Department of Labor ("Secretary") on March 10, 1999, alleging that respondent had discriminated against him in violation of Section 31105 of the STAA. On June 22, 2000, the Secretary determined, after an investigation of the above-captioned complaint, that the allegations lacked merit. On June 26, 2000, complainant objected to the Secretary's findings and requested that the claim be referred to the Office of Administrative Law Judges.

The claim was set for a formal hearing in on March 9, 2001. By agreement of the parties, that hearing date was vacated and rescheduled for June 25, 2001 in Akron, Ohio.

STIPULATIONS

The parties have stipulated to the following facts. Accordingly, I find that:

1. The United States Department of Labor, Office of Administrative Law Judges possesses jurisdiction over the parties and the subject matter of this claim.

2. Complainant is an employee, as defined in 49 U.S.C. § 31105.

3. Respondent is engaged in interstate trucking operations and is an employer subject to the STAA, 49 U.S.C. § 31105.

4. Respondent employed Complainant to operate commercial motor vehicles with a gross weight vehicle rating of 10,0001 pounds or more on the highways in interstate commerce since March 26, 1988.

5. Complainant previously filed a complaint with the Secretary of Labor (1998-STA-28) that alleged that respondent had disciplined complainant and discriminated against him in violation of 49 U.S.C. § 31105.

6. Administrative Law Judge Gerald M. Tierney issued a Recommended Decision and Order on May 11, 2000 that granted respondent's motion for summary decision on complainant's previous STAA claim (1998-STA-28).

7. The complaint giving rise to the docket number 1998-STA-28 was related to an alleged violation of a commercial motor vehicle safety regulation.

8. On January 14, 1999, complainant refused a dispatch from respondent that would have taken complainant from Copley, Ohio to Pittsburgh, Pennsylvania. In response to complainant's refusal, respondent took an adverse employment action which consisted of the issuance of a letter of warning to complainant on January 19, 1999. The warning letter was issued for "failure to report to work after accepting a work call on January 14, 1999."

9. Respondent notified complainant on April 19, 1999 that a five (5) day suspension had been imposed due to complainant's "overall work record." This record included, but was not limited to, complainant's failure to report to work on January 14, 1999.

10. Complainant filed a complaint with the Secretary of Labor alleging that he had been discriminated, disciplined and discharged in violation of 49 U.S.C. § 31105 by respondent.

11. The Secretary of Labor issued findings and an order on June 23, 2000.

12. Complainant filed and served objections to the Secretary's findings and order on June 26, 2000.

13. The time punches on complainant's time card dated May 12, 1998 were in reality for the date of June 12, 1998.

TR 11-13, 283.

HEARING TESTIMONY

Larry Eash

Complainant testified as to his educational and employment background. Complainant graduated from high school in 1972 and went on to ITT Tech School. (TR 15-16). Complainant received an associate degree in tool and dye engineering. (TR 16). Complainant worked as an engineer for approximately 7.5 years. (TR 16). Complainant then went to work for Oren Hofsteter, Inc. operating a "combination semi-tractor trailer" for 6.5 to 7 years. (TR 17). Complainant then went to work for respondent on March 26, 1988. (TR 17 & 89). Complainant testified that he has received "numerous" safety awards which have included stock incentives and vacations. (TR 19). Complainant stated that he has accumulated 968,000 safe driving miles and has had no "chargeable" accidents.[2]

[2] Complainant has had four accidents due to icy road conditions. Two accidents occurred in commercial vehicles and 2 occurred in his personal vehicle. However, in his deposition, complainant stated that he had 3 non-preventable accidents on icy roads. (TR 91). Complainant stated in his

(TR 20).

Complainant testified that he filed a complaint with the Secretary of Labor against respondent for alleged violations of the STAA in 1998. (TR 22). Complainant further stated that in the 10 years prior to the complaint he had received 8 to 9 letters of warning. (TR 31). Since that time, however, complainant states that he has received 10 to 11 letters of warning from respondent. (TR 32). Complainant states that he had made mistakes in the course of his employment in the past which were not disciplined and admits that he has made mistakes since that time that have not be disciplined. (TR 32).

Complainant testified as to respondent's allegation that he was late for work on June 12, 1998. (TR 22). Complainant stated that he is sure that he was not late on that date because he follows a normal procedure when being called to work. (TR 23). Complainant responded to the warning letter issued for this tardiness with a protest letter. (TR 23). Complainant alleges that the time clock that the drivers are required to punch when being dispatched is often incorrect.[3] (TR 30).

Complainant stated that he disagreed with the warning letter because respondent is unable to prove that he was late for work on June 12, 1998. (TR 94). This allegation is due to the fact that the time card is stamped May 12 instead of June 12. (TR 94). However, the parties have stipulated to the fact that the date on the time card was incorrectly stamped, and reflects complainant's work for June 12, 1998. (TR 283).

Complainant went on to explain that the call cards that drivers are given are prepared by the dispatchers and then are punched in the time clock. (TR 95). On the date in question, complainant was called at 1060. (TR 100). This would require complainant to report to work at 12:36. (TR 100). Complainant testified that he reported to work on that date at 12:30. (TR 101). Accordingly to complainant's log, he reported to work at 12:45.[4] (TR 103). Complainant attempted to explain the

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grievance that he had only 2 accidents, one in his personal vehicle and one in a commercial motor vehicle owned by respondent. (TR 93).

[3] Complainant went on to explain that respondent's clocks are often wrong, stating that at times, the clocks can "be off by hours." (TR 160). Additionally, complainant explained that the loads are sometimes not ready when the driver reports to work. (TR 160). Complainant also stated that a driver may sometimes be required to wait at the dispatch counter. (TR 162). Also, complainant testified that a delay can occur because a driver is forced to wait for other drivers to punch in before a that driver gets his own chance to punch in. (TR 162).

[4] Complainant explained that the original copy of his log is turned in to respondent at the end of his dispatch. (TR 157). Complainant stated that the log included in the record in this claim (CX 3) is

discrepancy by indicating that the "bills were not laying there and dispatch was not ready." (TR 103). Complainant admitted that if one assumed that complainant was called to work at 10:36, as indicated on the time card, that if he reported at 12:45, he would have been late. (TR 104). Complainant punched his time card at 1:00 on June 12, 1998. (TR 163). This is off by minutes when correlated with complainant's log. (TR 163). Complainant explained that if his first notation in his log was at 12:45, that he would have had to have received his paperwork before that time. (TR 163).

Complainant also stated that he had been late for work on prior occasions. (TR 120). Complainant further indicated that he is not required to call to notify respondent that he is going to be late unless he is going to be more than 15 minutes late. (TR 120). Complainant also stated that he has never voluntarily notified respondent of any work violations. (TR 121).

Complainant addressed the warning letter issued by respondent for failure to follow instructions. (TR 32-33). Complainant states that the facts underlying the warning letter are simply not true. (TR 33). Complainant stated further that he never received any written or verbal instructions that he was required to call "time critical" before leaving the client's location. (TR 33). Complainant states that special instructions are usually noted on the pay card that the driver receives from the dispatch office. (TR 37).

Complainant was issued dispatch papers to travel to the Gerstenlager Company is Wooster, Ohio on September 11, 1998. (TR 37). Complainant alleges that the instructions to call time critical should have been noted on this documentation. (TR 38). On complainant's paperwork, it is noted that complainant was to "call relay when loaded with pro number and trailer number." (TR 165). Complainant did comply with this instruction. (TR 165).

Complainant further alleges that he did not receive any instructions indicating that he was to call time critical before leaving the Gerstenlager on September 11, 1998. (TR 39). Complainant stated that was instructed to call the relay coordinator to provide him with the number on the bill of lading. (TR 39). Complainant explained that the trailers taken to Gerstenlager were empty and were to be loaded at Gerstenlager's location. (TR 39). Complainant stated that he did not receive verbal or written instructions as to the load being time critical. (TR 40).

Complainant made the run to Gerstenlager with 4 other drivers. (TR 106). One of these other drivers also was cited for failing to call time critical. (TR 106). Complainant admitted that he had taken time critical loads before and that on those occasions, he was given a cell phone. (TR 108). Complainant went on to state that he called time critical from Monroeville, Pennsylvania and that he was instructed to call time critical 4 hours out and 2 hours before arrival at his destination. (TR 113).

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off because the exhibit is a carbon copy of the original log and the pages must not have been matched correctly. (TR 157).

Complainant replied to the warning letter for failure to follow instructions with a protest letter dated September 17, 1998. (TR 42). Complainant followed the protest letter with a revised protest letter in January, 1999. In the revised letter, complainant indicated that he had been provided with a cellular phone. (TR 43). Complainant admitted that this action indicates that the load is time critical. (TR 43). Complainant stated that the revision was necessary because he had unintentionally left out details that he felt needed to be included in the protest letter. (TR 115).

Complainant testified that on the morning of January 14, 1999, he had finished a dispatch that originated in Copley, Ohio on January 13, 1999. (TR 44). Complainant's dispatch had taken him from Copley to Pittsburgh, Pennsylvania. (TR 44). Complainant testified that he left Copley at 6:30 p.m. on January 13, 1999 with the anticipated dispatch time of 2.5 hours. (TR 44-45). Complainant arrived in Pittsburgh at 10:30 p.m. (TR 45). Complainant did not meet the allotted dispatch time because of "extremely dangerous" weather. (TR 45).

Complainant explained that his usual dispatch starts on 6:30 p.m. on Monday, Wednesday, and Friday. At this time, complainant's "bid" called for complainant to travel from Copley to Pittsburgh, then from Pittsburgh back to Copley, and then return to Pittsburgh where complainant would be given the opportunity to rest. (TR 46-47). Complainant stated that while he was in Pittsburgh on January 13, 1999, snow was falling which subsequently changed to freezing rain. (TR 47). Complainant stated that he experienced difficulty considering the weather conditions and phoned Ed Tasz. (TR 48). Complainant reported to Mr. Tasz that the weather made conditions too dangerous to drive and that complainant would return once the freezing rain changed into snow. (TR 49). Complainant stated that Mr. Tasz told him to return as soon as he could leave the facility. (TR 49).

Complainant experienced a 1.5 hour delay in Pittsburgh. (TR 52). At that point, the weather had changed to snow and the snow was covering the ice. (TR 52). Complainant described the weather conditions as "treacherous." (TR 52). Complainant safely arrived back in Copley at approximately 2:30 a.m., but did not meet the allotted running time. (TR 53-54). Complainant was not dispatched for his return trip to Pittsburgh on the morning of January 14, 1999. (TR 55). Complainant stated that he discussed the weather conditions with Mr. Tasz who Mr. Tasz decided that complainant would not return to Pittsburgh at that time. (TR 56 & 127).

Complainant then returned to his home. (TR 56). Complainant testified to the observations that he made once he awoke after returning home on the morning January 14, 1999. Complainant stated that he observed a sleet and snow mixture falling at the time that he awoke on January 14. (TR 57). Complainant stated that he then consulted the weather reports on the radio. (TR 58). According to complainant, the reports indicated that freezing rain was moving into the area of complainant's home. (TR 58). Complainant then consulted the weather reports on the television. Complainant testified that he watched the report of a remote news crew reporting from Interstate 76 in East Akron. (TR 58). The crew was reporting that the road conditions were "extremely treacherous, not to travel unless it was an emergency situation, because they had freezing rain." (TR 58).

At approximately 3:45 p.m., complainant called respondent and spoke with a dispatcher named Lynette. (TR 58). Complainant told the dispatcher that he was "observing dangerous conditions" near his home, including freezing rain. (TR 59). Complainant stated that he "didn't feel [he] could possibly control a commercial motor vehicle."[5] (TR 58). The dispatcher transferred the call to a coordinator, Todd. (TR 59). Complainant then spoke with Todd. Complainant explained that he was observing the weather conditions around his home and that the traffic that he was observing was driving 30 to 35 miles per hour "because it was unsafe to travel at any higher rate of speed." (TR 59). Complainant further told Todd that he did not feel comfortable driving and that he felt it was unsafe to drive a commercial motor vehicle because complainant felt the conditions were unsafe

> [j]udging from the weather reports, from the television, and especially the one that I visually saw the camera crew out in with freezing rain falling in the background and actually on their clothing.

(TR 59).

Complainant explained that he asked Todd to dismiss him from the next dispatch and not require complainant to drive again until Friday at 6:30 p.m., his normal dispatch time. (TR 61). Complainant stated that he was told by Todd that his request could not be granted. (TR 61). Todd explained to complainant that other drivers were reporting to work and being dispatched. (TR 61). Todd indicated that none of the other drivers reported any problems. (TR 61).

Complainant testified that he made a second call to respondent on January 14, 1999. (TR 61). This call occurred at 7:30 p.m. (TR 62). Complainant went on to explain that during the time between the two telephone calls, he had observed the weather conditions around his home, noticed that the ice had "built up," and that the traffic on the highway near his home had "slowed to a crawl"and some had pulled off of the road. (TR 62). Complainant stated that the freezing rain started around his home at 7:00 p.m. (TR 65). Complainant stated further that he continued to monitor the weather conditions around his home and that the television was reporting that people were warned against traveling except in the case of emergencies. (TR 65). Complainant stated that he was aware of the weather conditions in Copley because of Copley's proximity to Akron which was the subject of the news report. (TR 129).

Complainant spoke with Todd when he phoned respondent at 7:30 p.m. (TR 69). Complainant explained to Todd that the freezing rain had "progressed to the point where it was at least as bad if not more so than on the date of January 22, 1982 when I rolled the semi unit." (TR 69). Complainant

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[5] Complainant made this telephone call even though he stated that he did not expect to be dispatched because the "dispatch was completely interrupted until Friday night at 6:30 p.m." (TR 127).

stated that he also told Todd that to "venture out in this type of highway with my experience would be foolish." (TR 70). Complainant again asked to be excused from being dispatched on this date. (TR 73). However, at this point, Todd informed complainant that he was just preparing to call complainant with a work call and to report for duty in 2 hours.[6] (TR 74). Complainant then stated that he told Todd that he was "begging [him] to avoid the dispatch." (TR 74). Complainant states that Todd told him that other drivers were reporting to work and that complainant was expected to do the same. (TR 74). Complainant then ended his telephone call with Todd.

Complainant stated that he waited an hour and observed the weather conditions outside of his home. (TR 75). Complainant states that at that time he observed a "clear ice on everything." (TR 75). Complainant testified that he drove his personal vehicle approximately 6.4 miles in "treacherous, extremely icy" conditions. (TR 75). It is approximately 26 driving miles from complainant's home to the terminal in Copley. (TR 121). Complainant stated that he left his residence at approximately 8:30 p.m. to report to work. (TR 138). This would be 15 minutes earlier than complainant would normally leave to report to the terminal on time. (TR 138). Complainant further testified that he lost control of his car on one occasion and had to pull onto the berm of the road. (TR 76). Complainant stated that he had no traction and could not stop the car. (TR 76). Complainant testified that he could not see to the left or to the right in his vehicle because of the ice build up on his windows. (TR 77).

Complainant pulled off of the road into a convenience store. (TR 78). Complainant stated that he checked the pavement surface and again telephoned respondent. (TR 78). The telephone call from complainant is logged as having occurred at 8:48 p.m. (TR 141). This would mean that complainant had traveled 6 miles in 18 minutes.[7] (TR 141). Complainant spoke with Mr. Tasz and informed Mr. Tasz that he was unable to make his way to work because he could not control his car and that he had no visibility, traction, steering, or ability to stop. (TR 78).

Complainant also stated that he asked Mr. Tasz if he knew the weather conditions at the terminal and Mr. Tasz reported stated that he did not know. (TR 130). Complainant proceeded to tell Mr. Tasz that he would not be able to make his run to Pittsburgh that evening because the television crew had reported freezing rain. (TR 79). Complainant stated that Mr. Tasz told him to "do what you have to do." (TR 79). Complainant then told Mr. Tasz that he was going to return home and Mr. Tasz told him "okay." (TR 80). Complainant admitted that Mr. Tasz never excused complainant from

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[6] Complainant stated that he did not accept the work call, but complainant allegedly attempted to make his way to the terminal. (TR 137).

[7] When asked on cross examination if his were so, complainant attempted to explain this by saying that he stated previously that he left home "around 8:30 p.m." which could mean 8:20 p.m. (TR 142).

reporting to work. (TR 145). Complainant stated that he made it clear to Mr. Tasz that he "feared for [his] life." (TR 154).

Complainant explained that he did not believe that it would have been safe to operate a commercial motor vehicle on the evening of January 14, 1999. (TR 80). Complainant bases this decision on the weather conditions that he observed, as well as the weather reports of freezing rain, the traffic patterns on the highway near complainant's home, personal observations of the freezing rain, the accumulation of ice on the windows and mirrors, and the ice on the road surface. (TR 81). Complainant did not feel that he would have been able to operate a commercial motor vehicle on the road surfaces as they existed at that time. (TR 82).

Complainant stated at the time of the hearing that he was more concerned with the conditions between Copley and Pittsburgh, however, in his prior deposition testimony, complainant testified that he could not drive because of the conditions he was personally observing. (TR 143-44). Complainant did explain that he was unaware of the weather conditions at the terminal in Copley. (TR 132). Additionally, complainant admitted that he did not know the driving conditions between Copley and Pittsburgh. (TR 132). Complainant also admitted that drivers are permitted to make safety decisions once they begin to drive and that complainant has never been disciplined by respondent for stopping his truck for safety reasons. (TR 134- 35).

A warning letter was issued to complainant for his failure to report to work after accepting a work call on January 14, 1999. Complainant replied with a protest letter dated January 22, 1999. (TR 83). Complainant testified that the letter stated that he contacted Mr. Tasz "for the purpose of informing him that [he] could not safely report for work." (TR 145).

Complainant was subsequently notified of a pending "local hearing" to discuss his work record. (TR 83). A "local hearing" involves a meeting between the union and the company in which it is determined whether discipline of the employee is warranted. (TR 85). The hearing resulted in a 5 day suspension because of the "accumulation of warning letters that prompted a hearing." (TR 86).

Complainant alleges that he lost approximately $900.00 as a result of the 5 day suspension. (TR 87).

Complainant wishes this Court to award to him $900.00 in gross wage loss, attorney fees, travel expenses for travel to depositions and hearings, incidental fees, and the expungement of the warning letters. (TR 88).

Mark Rosendale

Mark Rosendale testified at the hearing in this matter. Mr. Rosendale is a relay manager with respondent and has been since March, 1996. (TR 176). Mr. Rosendale has been employed by

respondent for 19 years. (TR 176). Before serving as relay manager, Mr. Rosendale was the district administrative manager. (TR 218). Mr. Rosendale testified that he has known complainant for approximately 5 years and would consider complainant to be a "pretty safe driver." (TR 218).

Mr. Rosendale explained the safety procedures employed by respondent and the policy surrounding designating a driver as "captain of the ship." (TR 176). Mr. Rosendale explained the "captain of the ship" theory as allowing the drivers, if

> they feel that the weather is unsafe or unsuitable to be driving in, that they have the opportunity to pull off the road and take a safe haven until the, until the weather clears. [Respondent] also shut lanes down, and what I mean by that is that we will discontinue dispatching based on weather reports that we have. If we feel that the conditions are such that it's not safe, the roads are not safe to put our drivers out there, then we'll quit dispatching to those destinations.

(TR 176). Mr. Rosendale stated that the driver is in the best position to determine if the equipment can be safely operated. (TR 220).

Mr. Rosendale went on to explain the procedures employed by respondent when dealing with hazardous weather conditions. Mr. Rosendale stated that respondent engages in some investigation which includes weather reports from the National Weather Service, reports from other terminals along the routes, reports from drivers, and reports from highway patrols. (TR 177).

Mr. Rosendale stated that respondents engage the services of Accu-Weather to monitor the weather conditions. (TR 178). The reports also show the progression of the weather. (TR 178). Mr. Rosendale went on to explain that the reports are received "several times a day." (TR 178). On January 14, 1999, respondent received an Accu-Weather report (RX 21) detailing snow from Buffalo, New York into the New England states. (TR 178). The report showed that the middle area of the map was experiencing snow and ice and the bottom area was experiencing sleet and freezing rain. (TR 178). Mr. Rosendale stated that Copley was in the middle section of the map. (TR 222). However, Mr. Rosendale points out that Copley was on the trailing edge of the weather system at 3:00 p.m. (TR 250).

The decision as to whether a terminal or lanes will be closed to inclement weather is customarily made by a coordinator. (TR 227). The decision is made on the information discussed above. (TR 227). Mr. Rosendale stated that a driver is expected to begin his assigned route and stop if unsafe conditions arise. (TR 246). Mr. Rosendale clarified that a driver would not be sent out on a run if it was believed that dangerous conditions existed. (TR 251). Mr. Rosendale also testified that a driver would not be called to work if respondent had received notification of a severe weather condition. (TR 252).

Mr. Rosendale went on to explain a tonnage report contained in the record in this claim. (TR 179 & RX 22). A tonnage report shows the "tonnage out of our break bulk area, our district, that the satellite terminals that we pick up freight that comes into us." (TR 179). Mr. Rosendale examined the tonnage report for January 13 and 14, 1999. (TR 180). Mr. Rosendale stated that the tonnage for both of these days was under the expected average, but that shipping is always slower in January. (TR 180). Mr. Rosendale did state however, that when there is bad weather, the tonnage numbers will be lower. (TR 223). Mr. Rosendale also explained, that pursuant to the collective bargaining agreement, that respondent is only permitted to use railway transportation to ship cargo if all of respondent's drivers are working or unavailable. (TR 181).

Mr. Rosendale went on to discuss the pay cards and logs of eleven drivers that drove at various times and in various places on January 14, 1998. (TR 181-94). None of these documents indicate the weather conditions experienced by the drivers and none of the drivers testified at the hearing. Mr. Rosendale stated that it is the customary practice of drivers to complain about weather conditions on the log or the pay card. (TR 227).

Mr. Rosendale went on to explain the procedure employed when an employee grieves a suspension. (TR 196). A disciplinary hearing is conducted in which both the union and the company present the evidence surrounding the disciplinary action. (TR 196). The employer can ask for a suspension and the employee is free to grieve the suspension, if it is approved. (TR 196). If an employee chooses to grieve the suspension, the claim goes before the Ohio Joint Area State Committee (hereinafter "OJSC"). (TR 196).

The OJSC is an executive board comprised of representation of the Teamsters as well as the company. (TR 197). Before the OJSC, both sides present their claim and the committee decides whether the imposition of the disciplinary action was appropriate. (TR 197). Complainant's grievance was denied by the OJSC. (TR 198). Mr. Rosendale testified on cross-examination that the decision issued by the OJSC does not include any rationale for the decision. (TR 207). There is also no appellate body after the OJSC. (TR 207).

Mr. Rosendale also testified that complainant was not permitted to have an attorney at the OJSC hearing as per the terms of the collective bargaining agreement. (TR 207). Complainant was represented by the union's business agent at the OJSC hearing. (TR 207). The business agent is elected by the union membership. (TR 207). Additionally, the OJSC does not examine any potential violations of the STAA. (TR 208).

Complainant received a suspension for his activities in the 9 months prior to the hearing. (TR 199). Under the terms of the collective bargaining agreement, only the previous 9 months can be reviewed. (TR 199). Mr. Rosendale testified that any of the incidents giving rise to the disciplinary action alone would not have been enough to warrant a suspension, however, taken together the suspension was warranted. (TR 199-200).

Mr. Rosendale went on to explain the procedure concerning time critical loads. Mr. Rosendale explained that "time critical of exclusive use" is the quickest way to move freight. (TR 200). This type of shipping guarantees that the shipment will arrive by a certain agreed upon time or the customer is not required to pay for the shipping. (TR 200). Mr. Rosendale testified that 4 drivers were sent to Gerstenlager in September, 1998. (TR 200). The drivers were sent with empty trailers that were loaded at Gerstenlager and the freight was hauled from there. (TR 201). Mr. Rosendale explained that it is important for the drivers to call time critical because the agreed upon time for the delivery begins to run at the time that the freight is picked up. (TR 201).

Mr. Rosendale testified that the drivers going to Gerstenlager were instructed to call time critical. (TR 202). Mr. Rosendale admitted however that he did not give the instructions to complainant personally. (TR 209). Mr. Rosendale stated that it is standard procedure for drivers who are carrying time critical loads to call once the freight has left the shipper. (TR 203). This has been respondent's procedure for 4 to 5 years. (TR 203). Mr. Rosendale testified that instructions are given to the drivers both in written form and verbally. (TR 211).

The dispatch time for a driver is noted on the pay card at the time that it is prepared. (TR 214). Mr. Rosendale testified that the pay card is usually prepared after the driver is called for a specific run. (TR 214). Mr. Rosendale also testified that there is no set time when the clocks in the terminal are calibrated. (TR 217). Mr. Rosendale stated that he would expect the drivers to complain if the clocks were not recording the correct time. (TR 217). Mr. Rosendale stated further that he has reset the clock himself several times and the clocks are very reliable. (TR 217).

Mr. Rosendale testified that discipline must be issued through warning letters as per the collective bargaining agreement. (TR 205). Mr. Rosendale concluded by stating that no warning letters were issued to complainant in retaliation for complainant filing the March, 1998 STAA claim. (TR 206).

Dennis McMickens

Dennis McMickens testified in his position as Director of Corporate Safety and Workers' Compensation at the hearing in this matter. (TR 253). Mr. McMickens has held this position since October, 1994. (TR 253). Mr. McMickens testified that there were only two accidents reported between Ohio and Pennsylvania on January 14, 1999. (TR 254). One of these accidents involved a delivery truck that allegedly struck a door and the other involved one of respondent's drivers that was hit by another vehicle that slid on the ice. (TR 254). Mr. McMickens obtained this information from the corporate safety and workers' compensation divisions and the insurance data base. (TR 255).

It is respondent's policy that all accidents be reported. (TR 255). Mr. McMickens testified that respondent employs the Smith System which involves "5 defensive keys to avoid accident involvement." (TR 256). Mr. McMickens testified that when the turnpike roads become unsafe, truck

traffic is restricted. (TR 258). The trucks are required to pull off of the road at the nearest stop and no further trucks are permitted to be dispatched. (TR 258). Mr. McMickens believes that the road conditions are not considered unsafe until the roads are closed because respondent's drivers are "professional, trained, experienced drivers." (TR 259).

Mr. McMickens testified that if traveling on the roads is "risky or there are noticeable changes in the weather or severe weather moving in rapidly" then respondent can "shut down particular lanes." (TR 260). Mr. McMickens admitted that there are some weather conditions that exist when no one should be driving. (TR 263). Mr. McMickens clarified that the driver is the "captain of the ship" but that does not excuse the driver from executing his or her duties and responsibilities. (TR 264). However, the ultimate decision as to whether the driver should continue to drive or not is made by respondent. (TR 265). Respondent makes this decision based on the information received from the drivers, Accu-Weather reports, and law enforcement. (TR 266). Mr. McMickens pointed out that one need not be out on the roads to determine the condition of the roads and that reports can be relied on in making the decision. (TR 266). If a driver decides to take himself or herself off of the road, then the relay coordinator and the contact point must be telephoned. (TR 267).

Timothy Doody

Timothy Doody gave testimony in the above-captioned claim. Mr. Doody was a relay coordinator for respondent from January 1, 1998 through April, 1999. (TR 270). Mr. Doody has been employed by respondent for 23.9 years. (TR 270). Mr. Doody instructed the dispatcher to phone complainant to make a run to Indianapolis on June 12, 1998. (TR 273). The telephone call was noted at 1060. (TR 273). Mr. Doody indicates that he is aware of the time of the call because of the time punched on the call card. (TR 275). Complainant was expected to report to work within 2 hours of the call. (TR 277).

Mr. Doody is sure that complainant was late on June 12, 1998 because when complainant arrived at the terminal, Mr. Doody stamped the card at 1294 and wrote "late" on the card. (TR 277). The time that the card was punched was when Mr. Doody saw complainant in the driver's room. (TR 277). Mr. Doody testified that the warning letter issued in connection to this incident was not motivated by or because of complainant's March, 1998 STAA claim. (TR 283). Mr. Doody testified that the letter was issued because complainant was late for work. (TR 283). Mr. Doody states that he always uses the first punched time when determining if someone is late because it is punched while talking to the driver. (TR 299). Mr. Doody testified that he usually "cuts a driver some slack" if the tardiness is not habitual. (TR 291).

Mr. Doody explained the way in which call cards are prepared. The call card is computer generated. (TR 274). The information is entered into the computer by a relay clerk or a relay dispatcher. (TR 274). The clerk or dispatcher enters the driver's name, social security number, and

time of arrival. (TR 274). The time is noted on the call card by a time punch that is done when the driver is offered the available routes. (TR 276).

Mr. Doody indicated that lines do not form at the dispatch window and that the clock is calibrated when it is determined that there is an error in the time being recorded. (TR 292-93). Mr. Doody does not believe that all of the cards are punched at the same time when the drivers are called to work because such a practice would create problems with the drivers choosing loads based on the order that they were called. (TR 293-94). The call cards are completed within the 2 hours in which the drivers are supposed to report to work. (TR 297).

Mr. Doody went on to explain the work rules employed by respondent (RX 15). Mr. Doody explained that once a driver accepts a work call, he or she has 2 hours to report to the terminal. (TR 284). Mr. Doody went on to state that if a driver is 15 minutes late, the driver can be sent home and the load is recalled. (TR 284). If a driver calls and says that he or she is going to be late, then the load is held for 45 minutes. However, even if the load is held, the driver still may be disciplined. (TR 284). On June 12, 1998, complainant could have been sent home according to the work rules. (TR 285). However, Mr. Doody admitted that he employs discretion in determining whether or not to send a driver home. (TR 290).

Mr. Doody went on to discuss the procedures employed by respondent when adverse weather conditions occur. (TR 286). Mr. Doody testified that all of the following are consulted: weather reports; news broadcasts; observations of the current conditions; speaking with coordinators at other locations; consulting staff at satellite terminals; and information from drivers out on the highways. (TR 286). Mr. Doody indicated that the ultimate decision as to whether to continue to drive or not rests with the driver. (TR 287). Mr. Doody testified that drivers are not disciplined if the driver decides to pull off of the road and wait for the weather to clear. (TR 288). Whether or not respondent decides to take drivers off of the road or not dispatch any more drivers is the decision of the coordinators. (TR 288).

Mr. Doody explained that the relay coordinator has some discretion in deciding whether to discipline a driver. (TR 289).

Ed Tasz

Ed Tasz was a relay coordinator for respondent from September, 1998 through January, 1999. (TR 302). Mr. Tasz testified that he is no longer employed by respondent. (TR 303). Mr. Tasz testified as to the circumstances surrounding January 14, 1999. Mr. Tasz stated that he remembers complainant calling the terminal and complaining about the weather conditions. (TR 303). Mr. Tasz remembers that complainant had called from some point on his drive to work. (TR 303). Mr. Tasz testified that complainant stated that roads were icy and that ice was collecting on his windshield. (TR 303-304).

Mr. Tasz stated that he understood complainant's telephone call to be a "plea that he did not want to come to work." (TR 305). Mr. Tasz remembers making a comment to the effect of "do whatever you have to do," but did not excuse complainant from reporting to work (TR 305). Mr. Tasz testified that he also told complainant to "do what you have to do, Larry, and I'll do what I have to do." (TR 306).

Mr. Tasz also testified to time critical load that was to be delivered on September 14, 1998. (TR 306). Mr. Tasz testified that complainant, along with 3 other drivers, were to report to Gerstenlager in Wooster, Ohio to pick up time critical loads which were to be transported from Wooster to some point in Michigan. (TR 306).

Mr. Tasz testified further that the time critical department wanted the drivers to call in once they received the paperwork and were ready to leave Gerstenlager. (TR 307). Mr. Tasz stated that he made sure that the clerk was reminded that the drivers were to call time critical before they left Gerstenlager. (TR 307). Mr. Tasz also stated that it is his customary practice to remind the clerk when time critical loads are involved. (TR 307). However, Mr. Tasz did not personally hear the clerk give the instructions to the drivers. (TR 310). Mr. Tasz did indicate that instructions can be given both orally and by written communication. (TR 310). Mr. Tasz pointed out that since this incident, he started to type instructions on the time cards. (TR 310).

Mr. Tasz explained the importance of the drivers calling in when they are carrying time critical loads. It is necessary because that is when the paperwork for billing the client is completed. (TR 311). Mr. Tasz also explained that the relay office cannot provide the information to time critical, the information must be directly reported to the time critical department from the driver. (TR 311). Mr. Tasz reiterated that complainant was instructed to call the time critical department. (TR 312).

Mr. Tasz explained that September 14, 1998 warning letter was not related, in any way, to complainant's March, 1998 complaint. (TR 308). Mr. Tasz stated that the letter was issued because complainant failed to follow the instructions to call time critical. (TR 309).

Gary Kiser

Gary Kiser was the line haul dispatcher for respondent in September, 1998. (TR 315). Mr. Kiser stated that complainant was dispatched to Gerstenlager on September 14, 1998 with 4 other drivers to pick up a time critical load. (TR 315). Mr. Kiser stated that he gave instructions to the drivers and informed them that they were to call time critical as soon as the load was ready or when the driver was prepared to leave. (TR 316). Mr. Kiser testified that he specifically remembers relaying the instructions to complainant. (TR 316).

Mr. Kiser stated that the instructions were given orally and that no written documentation regarding the time critical instructions was given to the drivers. (TR 318). Mr. Kiser testified that all 4

of the drivers were called in to report to work together. (TR 320). Complainant's time card showed him being dispatched at 2050, however this time was crossed out and 2125 was handwritten on the time card. (TR 320). Mr. Kiser does not know who crossed out and changed the dispatch time. (TR 320).

Mr. Kiser then reviewed the time cards of the other 3 drivers dispatched to Gerstenlager. (TR 320). Driver Arnold punched out at 2122. Drivers Dean and Border punched out at 2076, 8:45 p.m. (TR 320). Driver Dean's log shows the driver arriving at and leaving the terminal at 8:45 p.m. (TR 320). On cross-examination, Mr. Kiser admitted that complainant could not have received instructions with Driver Dean if that driver had left the terminal at 8: 45 because complainant did not arrive at the terminal until 9:00 p.m. (TR 320).

Mr. Kiser reiterated that he is "fairly certain" that all of the 4 drivers dispatched to Gerstenlager were given the instructions to call time critical together. (TR 327). Mr. Kiser explained that the logs are completed by the drivers, while the time cards are punched by a clock, and that is the time that respondent considers the drivers to have left the terminal. (TR 327). Mr. Kiser points out that discrepancies between the logged time and the punched time can arise as is evidenced by the fact that Driver Border's logs shows that he began driving at 8:45 p.m. on September 14, 1998 while the time card shows that he left the terminal at 9:20 p.m. (TR 328).

RESPONDENT'S EXHIBITS

June 12, 1998 Evidence

On June 15, 1998, respondent issued a warning letter to complainant stating that complainant had reported to work 20 minutes late on June 12, 1998. (RX 2). Complainant responded with a "protest letter" dated June 22, 1998. (RX 3). In that letter, complainant challenged the accuracy of the time card that was the basis of the warning letter. The card is dated May, 12, 1998, not June 12, 1998. Complainant stated in his protest letter that respondent was unable to "provide accurate and factual punch marks recorded [on the pay card] to verify the accusation that [complainant] was .34 late on June 12, 1998." (RX 3, emphasis in original). Complainant stated in his protest letter that he considered the statements contained therein to be inaccurate.

Also included are complainant's time sheets for June 12 through June14, 1998. (RX 4). It is noted on complainant's June 12 time card that complainant reported at 1294, and it is marked "late." Complainant's pay cards and logs for June 10, through June 13, 1998 are also included in the record. (RX 6). Complainant's log for June 12, 1998 notes that complainant was on duty starting at 12:45 p.m. (RX 6).

September 10, 1998 Evidence

Complainant was issued another warning letter on September 14, 1998. (RX 7). This letter was issued by respondent for complainant failing to follow instructions. The letter states that complainant was to call time critical before leaving a customer September 11, 1998. The letter alleges that complainant failed to make this call. Complainant responded to respondent's warning letter with a "protest letter" dated September 16, 1998, which was subsequently revised by complainant on January 28, 1999. (RX 7 & 8).

The initial protest letter states that complainant was to call time critical on September 11, 1998, and complainant points out that he was not at Gerstenlager on September 11, but was there on September 10, 1998. If the instructions were delivered on September 11, 1998, then complainant alleges that the instructions were "too late." Complainant also states in this protest letter that he was given a cellular telephone but that he was not instructed on "when and how often to use it." Complainant states that he did not receive instructions to call time critical.

Complainant revised the protest letter on January 28, 1999. (RX 8). Complainant points out in this letter that he telephoned the relay office with the information. Also included are complainant's pay cards and logs for September 10 through September 12, 1998. (RX 9). Complainant's trip to Gerstenlager is noted on the pay card and log for September 11, 1998. There are no instructions on these documents indicating that complainant was to call time critical.

A warning letter issued to one of the other drivers dispatched to Gerstenlager for failure to follow instructions is also included in the record in this claim. (RX 10). The pay cards and the logs of the other 3 drivers dispatched to Gerstenlager are also included in the record. (RX 11-13).

Respondent alleges that complainant was told to telephone respondent's terminal "time critical" when complainant completed his delivery. *See* Respondent's Motion to Dismiss, p. 8-9. Complainant replied with a "protest letter." This letter alleges that complainant was never instructed to call respondent's terminal when he left the client's location on September 11, 1998. Complainant stated that he was given a cellular telephone and instructed on how to use the telephone but that he was not told when he was to use the telephone. *See* RX CC. Additionally, complainant states in his "protest letter" that if he was given the instruction to call "time critical" on September 11, 1998, that doing so would be impossible considering the fact that complainant left the customer's location on September 10, 1998. Again, complainant is unwilling to accept that the date discrepancy is a typographical error.

January 19, 1999 Warning Letter

On January 19, 1999, respondent issued a warning letter to complainant for failure to report to work after accepting a work call. (RX 17). This letter was issued for complainant's failure to report to work on January 14, 1999. The letter states that complainant was called for work at "2080 ...

[complainant] called back and said [he] would not be coming to work and in fact did not show up for work." Complainant responded with a "protest letter" dated January 22, 1999. (RX 18).

In that letter, complainant alleges that he had received no work call from respondent on the date mentioned in the warning letter. Complainant further stated that he called respondent to request that he be removed for "the wheel" for "the sake of 'safety' to avoid driving that night due to 'freezing rain and icy road conditions'." Complainant states further that he did not report to work on that date because of the weather conditions. Complainant states in the protest letter that he attempted to report to work but that he experienced freezing rain on the windshield of his personal vehicle and icy road conditions. The letter states that he was told to "do whatever you have to do." Complainant stated that he based his decision to return home instead of reporting to work, on "17 years of driving commercial motor vehicles, 1.5 million miles of safe driving, and no moving violations in commercial vehicles for over 12 consecutive years." (emphasis in original).

Complainant's time sheet for January 14, through January 16, 1999 is included in the exhibits in this claim. (RX 19). The timesheet for January 14, 1999 shows that complainant called respondent at 2080 and indicated that he would "not [be] coming in after accepting work call."

Pay cards for 11 drivers that were on the roads on January 14, 1999 are included in respondent's exhibits. (RX 24-34). Some of the cards pertain to drivers who traveled a similar route to that which complainant would have driven that evening, and others pertain to drivers who used to local roads that would have been used by complainant.

Complainant's log for January 14-15, 1999 is included in the record. (RX 39). Also complainant's pay card for January 5, 1999 is included. (RX 38). This card indicates that complainant was forced to stay in Pittsburgh, Pennsylvania because of the weather conditions at that time.

Other Evidence

Complainant's Grievance and Attachment, dated January 29, 1999 is included in the record in this claim. (RX 14). Complainant filed the grievance in response to the 5 day suspension that he received. Complainant stated in the grievance that he did not believe that he engaged in any behavior that warranted the warning letters. Complainant considered his work record "exempiary" [sic] and noted specific examples of why he believes that this is the case. Complainant pointed out in the grievance that he had received 7 warning letters "within the past few months" indicating that "most" of the letters contained false information. Complainant also indicates that two of the letters are "in direct opposition to Federal Motor Carrier Safety Regulations." Complainant's grievance is noted as being withdrawn on February 4, 1999.

The work rules instituted by respondent are also included in the record in this claim. (RX 15). This document was submitted to support the testimony regarding drivers who report late to work. The relevant work rules states that

> [d]rivers who are going to be late that notify the company prior to their start time will have a load held for them for forty-five (45) minutes. Drivers who fail to call will have a load held for fifteen (15) minutes. Drivers more than fifteen (15) minutes late that fail to notify the company prior to their start time will be sent home. Drivers late will be disciplined.

(RX 15).

A letter dated April 19, 1999 confirming the findings of the OJSC findings is also included. (RX 14). Included in the record in this claim is the line haul driver summary for May, 1998. (RX 5). Also included is complainant's line haul driver summary from March 15, 1999 through April 1, 1999. (RX 16). This was submitted by respondent to establish complainant's earnings during that time.

A map of northeast Ohio is included in the record in this claim. (RX 20). Additionally, an Accu-Weather report for January 14, 1999 at 3: p.m. is included. (RX 21). Respondent has also submitted a tonnage report for January, 1999. (RX 22). The climatological report from the Akron/Canton Airport for January, 1999 is also included. (RX 23).

Respondent has compiled composites of warning letters that pertain to similar infractions as those allegedly committed by complainant. Eighteen warning letters were issued between September, 1996 and October 22, 1998 for various employees being unavailable for work. (RX 35). Eleven warning letters were issued to employees of respondent between February 10, 1998 and August 13, 1998 for employees failing to follow instructions. (RX 36). Three warning letters were issued to various employees of respondent for reporting to work late between February, 1998 and June, 1998. (RX 37).

COMPLAINANT'S EXHIBITS

March 23, 1998 Complaint

Complainant filed a complaint with the Occupational Safety and Health Administration on March 23, 1998 against respondent for alleged violations of the STAA. (CX 1).

June 12, 1998 Evidence

The warning letter issued to complainant on June 15, 1998 is included in the record.[8] (CX 2). Complainant's response in the form of a protest letter is also included in the record. (CX 3).

September 10, 1998

Complainant's log for September 10-11, 1998 indicates the complainant drove to Gerstenlager to pick up freight which was then transported to Michigan. (CX 4). The warning letter issued by respondent and the protest letter response from complainant, which was revised in January, 1999, are a part of complainant's exhibits. (CX 5-7).

January 19, 1999 Evidence

The warning letter issued for complainant failing to report to work on January 14, 1999 is included in complainant's exhibits. (CX 11). Complainant's subsequent protest letter is also included. (CX 12).

Complainant submits climate data from NCDC for January 14, 1999. (CX 8). The notations for January 14, 1999 show that heavy snow was falling at 10:00 p.m. Additionally, it appears from this documentation that freezing rain was noted at the Akron/Canton Airport from 1720 through 2010 and again from 2010 to 2035. Many of the weather documents included in CX 8 are difficult to understand and complainant has offered no explanation for the proper way to interpret these documents. Also included in the record in this claim are various newspaper reports from the days surrounding January 14, 1999. (CX 10).

The Akron Beacon Journal indicates on January 15, 1999 that "frozen, snow covered highways" existed at that time. This same edition noted a story about a commercial vehicle that was unable to leave a rest stop because of "snow and slush." The edition also reports about the snow that had been removed from the roads in the Akron area.

The Canton Repository for January 15, 1999 stated that a Level 3 emergency existed on January 1-2, 1999 and that a Level 3 emergency had not occurred since then. The story from January 15 indicates that "[m]ost businesses reported that they have had relatively few problems with employees making it to work." Also included in this issue is a story relating to people suffering from "cabin

[8] Complainant's exhibits that were already discussed in the respondent's exhibits section will not be discussed again in this section. There is no discrepancy between the warning letters and protest letters submitted by both sides, therefore, discussion in both sections is not necessary.

fever." Additionally, an article from the Repository from January 14, 1999 shows a person clearing ice from a windshield.

The Massilon Independent indicated that 5 to 7 inches of show had fallen and 14 inches of snow was already on the ground by the time the newspaper was printed for January 15, 1999. The January 14, 1999 edition of this paper indicated that the area was experiencing "snowfall and persistent ice," and noted that 2 to 7 inches of fresh snow had fallen. The edition also indicated that central and southern Ohio experienced ice on January 13, 1999. The paper reported that 2 to 4 inches of snow and some freezing rain and sleet was expected for January 14, 1999. The January 14, 1999 edition also reported that in the morning of January 14, 1999, a Level 2 emergency existed for icy conditions or blowing and drifting snow and advised against using the roads unless necessary.

Several other stories from various newspapers are included. The Pittsburgh Post-Gazette on January 15, 1999 did not report any particular weather condition, but reported that some of the counties surrounding Pittsburgh were in a state of emergency. The same Post-Gazette edition reported that an ice storm occurred in western Pennsylvania and a state of emergency was declared on January 14, 1999. Stories from the Vindicator, which serves an undisclosed area, noted on January 15, 1999 that 4.2 inches of snow had fallen.

A story from the Daily Record, which serves either the Toledo or Dayton area,[9] indicates that a commercial motor vehicle was stuck on at a railroad crossing and the driver had to abandon the truck to avoid being injured by an oncoming train that struck the abandoned truck. There is also a report from a newspaper that Interstate 70 was closed for one hour on January 14, 1999 because of an accident involving 2 commercial vehicles and a car due to the icy roads. The report merely states that the accident occurred in "Liberty" and no further information was submitted to show where this area is located or the proximity to the conditions that complainant was experiencing.

Other Evidence

Complainant submits a warning letter dated January 26, 1999. (CX 13). The events surrounding this letter were dismissed from this claim pursuant to the summary decision motion and will be discussed no further. A letter from respondent, to complainant, is also included in the record in this claim. (CX 14). The letter indicates that complainant was being assessed a 5 day suspension based on the findings at the local hearing. However, complainant is also informed in this letter that he is able to continue to work pending the final adjudication of this determination. The letter confirming the findings of the OJSC is also included. (CX 15).

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[9] A determination of the area served by this newspaper cannot be determined by the submission.

Complainant's W-2 forms for 1998 and 1999 are also a part of the record. (CX 16&17). The complaint filed with OSHA to commence the above-captioned claim is also included in the record in this claim. (CX 18). The copy of the complaint submitted is not dated. Complainant's final exhibit is complainant's objections to the Secretary's Findings and Order dated June 23, 2000. (CX 19).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent, Roadway Express, Inc. engages in interstate trucking operations and its employees operate commercial motor vehicles over interstate highways, principally to transport cargo. The Secretary has consistently stated that the STAA should be interpreted liberally in order to promote an interpretation of the Act which is consistent with its Congressional intent, namely, the promotion of commercial motor vehicle safety on the nations highways. *See generally, Boone v. TFE, Inc.,* 90-STA-7 (Sec'y. July 17, 1991) DOL Decs. Vol. 5, No. 4, p. 160, 161, *Aff'd sub nom., Trans Fleet Enterprises, Inc. v. Boone,* 987 F.2d 1000 (4th Cir. 1992); *Somerson v. Yellow Freight Systems, Inc,* 1998-STA-9 & 11 (ARB Feb. 18, 1999).

The STAA protects employees from adverse employment actions when any person covered by the STAA engages in protected activity. The STAA states that

> (1) [a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because –
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) ... an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105 (a).

Whistleblower Complaint

In a STAA whistleblower claim, such as this one, complainant bears the initial burden of establishing a prima facie case of discrimination. In order to meet that burden, the complainant must establish the following elements: (1) that the complainant engaged in protected activity; (2) the employer then subjected the complainant to an adverse employment action; and (3) a nexus between the protected activity and the adverse employment action. *Stauffer v. Wal-Mart Stores, Inc.*, 1999-STA-21 (ARB, Nov. 30, 1999); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). *See Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3rd Cir. 1993); *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The standard to establish each element is by a preponderance of the evidence.

"Once a prima facie case of discrimination is established, ... the burden of production shifts to the [respondent] to articulate a legitimate, nondiscriminatory reason for its employment decision." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). If the respondent successfully rebuts the inference of retaliation, the ultimate burden lies with complainant to establish by a preponderance of the evidence that the legitimate reasons were a pretext for the discriminatory action. *Id. citing Wrenn v.Gould*, 808 F.2d 493, 500-01 (6th Cir. 1987); *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir.).

It is uncontested that complainant engaged in protected activity by filing a complaint with the Secretary of Labor on March 23, 1998. Therefore, complainant engaged in protected activity. It is also uncontested that complainant suffered an adverse employment action. Complainant served a five day suspension on April 19-23, 1999. Therefore, the only issue presented in this claim is whether there is a causal nexus between the protected activity and the adverse employment action.

Complainant has offered no evidence that the June 12, 1998 warning letter was issued in retaliation for complainant's March, 1998 OSHA complaint. Complainant states that he was not late for work on June 12, 1998, but offers no substantiation for this proposition.

Complainant states that respondent's time clocks are often incorrect, sometimes even "by hours." (TR 160). Complainant also states that loads are sometimes not ready when the driver arrives. (TR 160). Also, complainant alleges that drivers are sometimes required to wait at the dispatch counter or wait in a line behind other drivers to punch in at the time clock. (TR 162). While all of these things could have made complainant late for work on June 12, 1998, nowhere does complainant allege or indicate that any one of these events occurred on June 12, 1998. Therefore, I find that complainant has

failed to establish a causal link between the June 15, 1998 warning letter and his prior protected activity.

Complainant also alleges that the September 14, 1998 warning letter was issued in retaliation for complainant's March, 1998 OSHA complaint. Complainant states that he never received the instruction to call time critical on September 10, and therefore he could not have failed to follow the instruction.

Complainant admitted at the hearing in this matter that he understood the time critical nature of the delivery, but that he did not understand that he was to call from the customer's location once the load was prepared to be delivered. (TR 33). It is undisputed that no written instructions were given to complainant to call time critical.

Complainant also admitted that he received a cellular telephone, the purpose of which was to indicate that the load to be transported was time critical. (TR 43). Complainant also stated that being provided the telephone "permits time critical as soon as I get into that tractor trailer." (TR 43). Complainant testified that the telephone was accompanied by instructions to "call 4 hours out and 2 hours before your arrival at your destination." (TR 113).

I find complainant's testimony unpersuasive. It is within the province of this Court to make credibility determinations. Complainant has made it perfectly clear that he understood that he was transporting a time critical load. However, complainant alleges that he never received the instructions to call. Even assuming that complainant did not receive the instruction, which I believe he did, complainant has still failed to establish a causal nexus between the warning letter for complainant's actions on June 12, 1998 and his protected activity.

January 14, 1999 refusal to report to work

Complainant alleges that he engaged in protected activity on January 14, 1999 when he refused to report to work because of inclement weather. The refusal to operate a commercial motor vehicle in violation of a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health" is protected by the STAA. 49 U.S.C.A. § 31105(a)(B)(i). Complainant alleges that had be reported to work on that date and driven his commercial motor vehicle, he would have violated 49 C.F.R. § 392.14.

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke , adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can

> be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to the passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. § 392.14.

Both complainant and respondent have cited to *Robinson v. Duff Truck Line, Inc.*, 1986-STA-3 (Sec'y March 6, 1987), *aff'd Duff Truck Line, Inc. v. Brock,* 848 F.2d 189 (table)(6th Cir. 1988), in support of its proposition. The facts in *Robinson* are very similar to the facts surrounding complainant's activities on January 14, 1999. Robinson observed inclement weather in the area surrounding his home. Robinson called Duff's dispatcher to inform the dispatcher that he was not going to "make his run and that he was reporting off." *Id.* at 2. Robinson also informed the dispatcher that he was unable to get out of his driveway because of the weather. *Id.* Robinson was informed by the dispatcher that the failure to report to work would be considered a "voluntary quit." *Id.*

In *Robinson,* the Secretary found that "a reasonable interpretation of section 392.14 is that it applies whenever a driver encounters hazardous weather conditions whether before his dispatch from the terminal or when he is on the road." *Robinson* at p. 4-5. The Secretary noted that the intent of the regulation was to prohibit the use of commercial motor vehicles unless the vehicles could be safely operated in light of the weather conditions. *Id.* at 5. "In order to establish that [complainant's] refusal to drive is protected because he would have violated section 392.14, [complainant] must show that there existed ... the type of weather conditions which would make it unsafe to operate the vehicle." *Robinson,* at 5.

The weather conditions must in fact be that the vehicle cannot be safely operated. *Id.* The determination of whether unsafe weather conditions exist "requires exercise of subjective judgment of the driver and the information available at the time." *Id.* However, this decision is not reserved to the driver alone. "[W]hile the driver's refusal to drive is based on his assessment that the regulation would be violated, his refusal is protected only where this assessment is correct." *Id.* at 5, n.7.

The facts that the Secretary relies on in making the determination that hazardous conditions existed in *Robinson* require further examination. In determining that hazardous weather existed at the time that Robinson refused to operate his vehicle, the Secretary relied on the testimony of Robinson, a union steward and another driver. *Id.* at 6. Robinson testified that freezing rain was falling and that the ground was covered with ice which left Robinson unable to get his personal vehicle out of his driveway. *Id.* Robinson also testified that television stations were broadcasting weather warnings that travel was unsafe. *Id.*

The Secretary also relied on the testimony of Robinson's union steward that he personally observed some snow but mostly ice on the evening in question. *Id.* The union steward also testified that he telephoned the highway patrol and received reports that two major interstates were closed. *Id.*

The testimony of one of Robinson's fellow drivers was also accepted by the Secretary. The driver testified that he observed freezing rain snow and "blizzard conditions." *Id.* Meteorological reports were also relied upon by the Secretary in determining that the temperatures were below freezing level and that there was snow. *Id.*

The Secretary found that there was little evidence to support Duff's position that the weather conditions permitted travel. Duff offered evidence that approximately 90 drivers drove on the night in question. *Id.* at 8. However, the Secretary did not accept this evidence as establishing that the road conditions were safe. *Id.* The Secretary also pointed out that most of the driver evidence offered was for the morning of the date in question and not the evening which is when Robinson would have been driving. *Id.*

The Secretary also found that the coordinator that disciplined Robinson had no knowledge of the actual weather conditions. *Id.* at 7. Additionally, the Secretary found the coordinator's testimony to be less than credible because of several contradictory comments made by the coordinator. *Id.* The Secretary also found that the coordinator did not follow Duff's established practice for determining the weather conditions. *Id.*

In determining whether complainant is entitled to protection for his refusal to drive on January 14, 1999, it is necessary to determine the weather conditions as they existed on that date. There is no question that complainant is entitled to invoke the protections of the STAA before arriving at respondent's terminal. *Id.* at 4-5. Therefore, the only question remaining is whether complainant's assessment of the weather conditions on January 14, 1999 was correct.

Complainant first called respondent's terminal at 3:45 p.m. to report that he was observing freezing rain and that he wished not to be dispatched. (TR 58-59). Complainant asked that he not be dispatched based on his observation of the conditions around his home and the traffic on the highway near his home. (TR 59). Complainant also testified that the weather reports were indicating that Akron was experiencing freezing rain. (TR 59).

Complainant again telephoned respondent on January 14, 1999 at 7:30 p.m. (TR 62). At that time, complainant indicated to respondent that he was observing freezing rain around his home and that the traffic had slowed down even more and some of the cars had pulled off of the road. (TR 62 & 65). Complainant stated further that he was monitoring the weather via television and that the reports indicated that people were urged to stay off of the roads except for emergencies. (TR 65).

Complainant again asked to be excused from dispatch. (TR 73). Complainant was told that he should consider the call a work call and that he was expected to report to work within 2 hours. Complainant stated that he waited approximately an hour, while continuing to monitor the weather. (TR 75). Complainant then stated that he attempted to embark on his trip to the terminal in his personal

vehicle and experienced "treacherous, extremely icy" conditions. (TR75). Complainant stated that he allowed himself an additional 15 minutes to report to work. (TR 138).

Robinson indicates that complainant bears the burden of establishing that the adverse weather conditions existed at the time that complainant failed to report to work. I find that complainant has failed to establish that freezing rain conditions existed at the time that complainant requested to be relieved from duty. Unlike the situation in *Robinson,* complainant has offered only his own testimony that such conditions existed on January 14, 1999. Complainant indicates that he observed freezing rain and that he saw weather reports indicating the same.

It is within the province of this court to determine the credibility of witnesses. After observing complainant at the time of the hearing in this matter, I do not find complainant's testimony to be credible. I find complainant's explanations for the discrepancies in his testimony to be unconvincing. In *Robinson,* the Secretary found not only Robinson's testimony to be persuasive, but also the testimony of Robinson's union steward and another driver. Such testimony is not presented here. Complainant relies only his own assessment of the situation to establish that hazardous weather conditions existed on January 14, 1999. Additionally, the documentation submitted by complainant does not establish that such weather conditions existed at the time complainant alleges.

I also find that this claim is distinguishable from *Robinson* on the documentation submitted to support complainant's conclusion that unsafe conditions existed. Complainant submitted the meteorological reports from Akron Airport on January 14, 1999.[10] The NCDC Climate Report indicates that 6 to 10 inches of snow fell on the Akron area on January 14, 1999. (CX 8). However, this report does not support complainant's contention he was experiencing freezing rain conditions on January 14. Additionally, the 5 minute interval reports from Akron Airport on January 14, 1999 indicate the freezing rain was observed from 8:50 a.m. through 9:55 a.m. and again from 5:20 p.m. through 8:35 p.m. (CX 8). Complainant alleged that the freezing rain conditions began at 3:45 p.m. when he first telephoned respondent. This is clearly not indicated by the documentation submitted by complainant.[11]

Complainant also submitted several newspaper articles detailing the weather conditions as they existed on January 13-15, 1999. While I find that these reports are of little relevance because complainant did not rely on them in making his decision that the conditions did not permit safe operation

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[10] I note that complainant has offered the Court no assistance in how to correctly interpret the reports submitted. Therefore, the Court has done the best it can in determining the significance of the reports submitted.

[11] Complainant also testified that he freezing rain began around his home at 7:00 p.m. (TR 65). Again, this is a discrepancy in complainant's testimony. I have used the 3:45 p.m. time because that is when complainant first said that he observed the freezing rain.

of a commercial motor vehicle, I find that the reports undermine complainant's credibility. Only one of the newspaper reports details freezing rain conditions and that report is from the Pittsburgh Post-Gazette. Complainant does not allege that he watched weather reports from Pittsburgh, Pennsylvania, and therefore, this report is of little relevance. The newspaper reports from the areas in and around complainant's home detail the snowfall for the area, however, not one of the reports details any freezing rain. All of the documentation submitted in *Robinson* supported Robinson's conclusion that unsafe weather conditions existed at the time of his refusal to drive.

Accordingly, I find that complainant has failed to establish that the type of weather conditions existed that would have made it unsafe to operate a commercial motor vehicle on January 14, 1999. Complainant's assessment of the situation was not correct and therefore, complainant is not entitled to the protection of the STAA.

Additionally, complainant alleges that he is entitled to STAA protection pursuant to 49 U.S.C.A. §31105(a)(B)(ii). The STAA protects an employee from discharge, discipline, or discrimination when

> the employee refuses to operate a vehicle because
>
> the employee has a reasonable apprehension of serious injury to the employee of to the public because of the vehicle's unsafe condition.

49 U.S.C.A. §31105(a)(B)(ii).

Under the STAA,

> an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a)(B)(2).

The Secretary's decision in *Robinson* also addresses the application of this statutory provision to a refusal to drive due to weather conditions. The Secretary found that the aforementioned provisions apply to "conditions which make the operation of a commercial motor vehicle on the roads a safety hazard." *Robinson,* at 9. The Secretary found the provisions applicable because the weather conditions make the driving hazardous and thus, render the equipment unsafe on the highway. *Id.*

Robinson's refusal to drive was found to be entitled to protection under this provision because of several factors. First, Robinson had observed the weather conditions, he had heard the weather advisories, Robinson was familiar with the roads, and Robinson's truck experienced very specific problems that would render it "more dangerous." *Id.* Robinson always drove the same truck on his appointed route. Therefore, he was very familiar with the way that the truck would handle in winter weather conditions. Steering Robinson's vehicle became more difficult icy and snowy conditions existed. *Id.*

It appears that the Secretary places some significance on this aspect of Robinson's claim. The Secretary noted that "[b]ecause the front end of this tractor tended to rise when it pulled a loaded trailer, and because of the type of tires on it, Robinson felt that this tractor was difficult to handle on ice and snow." *Id.* at 2.

The Secretary also established a second element to the determination of the reasonableness of the refusal to drive. The Secretary noted that "Robinson received no information from [respondent] as to weather conditions, which might have led Robinson to alter his assessment of the danger of driving his assigned trip." *Id.* at 9. Complainant did not receive any information from respondent when he telephoned on January 14, 1999 that would alter his assessment of the situation.

As previously discussed, I have found that complainant's testimony as to the weather conditions at the time that he refused to report to work, entitled to less weight. However, this aspect of the STAA provides protection based on a reasonable person standard. Therefore, I find that a reasonable person in complainant's situation could have determined that a bona fide danger of accident or injury to his person existed and complainant had a reasonable apprehension of serious injury himself or to the public because of the vehicle's unsafe condition.

Accordingly, I find that complainant has established protected activity pursuant to 49 U.S.C.A. §61105(a)(B)(ii).

Whether complainant was retaliated against because of his protected activity.

There is no dispute that complainant was disciplined in the form of a 5 day suspension. However, there is no indication that this action was taken based solely on complainant's protected activity. Complainant alleges that this is a mixed motive case because both discriminatory and nondiscriminatory reasons were proffered for the adverse employment action. Respondent offered evidence that any one of complainant's warning letters would not haven given rise to the suspension, however, all of them taken together warranted a suspension. *See* Rosendale testimony at TR 199-200.

The adverse employment action that complainant experienced solely because of the protected activity was the warning letter issued because of his refusal to drive on January 14, 1999. Complain

ant's was suspended due to his entire work record, not just his refusal to drive on January 14, 1999. I find that respondent has offered sufficient evidence to establish that even in the absence of the January 19, 1999 warning letter, complainant would have been suspended. In support of this, I credit the testimony of Mr. Rosendale and the assessment that the suspension was based on complainant's entire work record. (RX 14).

Complainant requests compensatory damages in lost wages, interest on back pay, attorney fees and costs, and that a copy of this decision and order be placed in "a conspicuous location for drivers and management to view it at its terminal in Copley, Ohio." *See* Complainant's Post-Hearing Brief at 24. I find that the proper remedy is to expunge the warning letter issued to complainant for his failure to drive on January 14, 1999. I find that this remedy is all that is necessary to abate the violation pursuant to 49 U.S.C.A. §31105(b)(3)(A)(i).

ORDER

IT IS HEREBY ORDERED THAT Roadway Express, Inc is to expunge the January 19, 1999 warning letter issued to Larry Eash from his permanent record.

IT IS FURTHER ORDERED THAT respondent is to pay costs incurred by complainant in bringing the complaint, including attorney's fees. Those fees are required to be reasonable and must be approved by the undersigned. Complainant's counsel is permitted 20 days to submit an application for approval of representative's fees to the undersigned. Respondent is permitted 10 days for response.

A
ROBERT J. LESNICK
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).